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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 LARRY J. TOLLIVER,)
7 Plaintiff,) No. CV-10-422-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on April 27, 2012 (ECF No. 10,
15 14). Attorney Maureen J. Rosette represents plaintiff; Special
16 Assistant United States Attorney Marc Thayne Warner represents the
17 Commissioner of Social Security (defendant). The parties have
18 consented to proceed before a magistrate judge, ECF No. 4. After
19 reviewing the administrative record and the briefs filed by the
20 parties, the court **grants** defendant's motion for summary judgment
21 (**ECF No. 14**).

22 **JURISDICTION**

23 Plaintiff protectively applied for disability insurance
24 (DIB) and social security income (SSI) benefits on November 18,
25 2006, alleging disability beginning March 14, 2006, due to
26 shoulder and back pain, limited lifting ability, diabetes,
27 arthritis, panic attacks, and borderline intellectual functioning
28

1 (Tr. 61-63, 116, 451-462). The applications were denied initially
2 and on reconsideration (Tr. 31-34, 36-37).

3 At a hearing before Administrative Law Judge (ALJ) R. J.
4 Payne on January 28, 2010, plaintiff, represented by counsel, and
5 medical experts testified (Tr. 470-507). On March 3, 2010, the ALJ
6 issued an unfavorable decision (Tr. 15-28). The Appeals Council
7 accepted additional evidence and denied plaintiff's request for
8 review on October 22, 2010 (Tr. 7-10), making the ALJ's decision
9 the final decision of the Commissioner. Pursuant to 42 U.S.C. §
10 405(g), this final decision is appealable to the district court.
11 Plaintiff sought judicial review on December 2, 2010 (ECF No. 1).

12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing
14 transcript, the ALJ's decision, the briefs of the parties, and are
15 briefly summarized here where relevant.

16 Plaintiff was 41 years old at onset. He has an eighth or
17 ninth grade education and did not earn a diploma or GED. He lives
18 with his spouse and their two children, ages fourteen and
19 eighteen. He has worked as a cook/kitchen helper, custodian, and
20 laborer (Tr. 331, 486-489, 505). In 2003 he was injured on the job
21 and diagnosed with a bicipital tendon strain (Tr. 159, 489-491).
22 He had surgery to repair his left shoulder in March 2006 (Tr.
23 209).

24 Plaintiff testified pain interferes with sleep. Walking and
25 sitting are painful. Mr. Tolliver can stand ten minutes, walk 500
26 feet, and lift ten pounds (Tr. 495-496). He drives short
27 distances, and is sometimes able to vacuum and do laundry with
28 rest breaks (Tr. 497-498).

1 Plaintiff has had panic attacks since about 2002. Currently,
2 he experiences them about twice a week. He becomes nauseated and
3 begins sweating. He has 2-3 migraine headaches a week. Plaintiff
4 spends most of the day watching television (Tr. 499-501).

5 SEQUENTIAL EVALUATION PROCESS

6 The Social Security Act (the Act) defines disability as the
7 "inability to engage in any substantial gainful activity by reason
8 of any medically determinable physical or mental impairment which
9 can be expected to result in death or which has lasted or can be
10 expected to last for a continuous period of not less than twelve
11 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
12 provides that a Plaintiff shall be determined to be under a
13 disability only if any impairments are of such severity that a
14 plaintiff is not only unable to do previous work but cannot,
15 considering plaintiff's age, education and work experiences,
16 engage in any other substantial gainful work which exists in the
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 52, 1156 (9th
20 Cir. 2001).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled.
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
24 is engaged in substantial gainful activities. If so, benefits are
25 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
26 the decision maker proceeds to step two, which determines whether
27 plaintiff has a medically severe impairment or combination of
28 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination
2 of impairments, the disability claim is denied. If the impairment
3 is severe, the evaluation proceeds to the third step, which
4 compares plaintiff's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
8 App. 1. If the impairment meets or equals one of the listed
9 impairments, plaintiff is conclusively presumed to be disabled.
10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents plaintiff from
13 performing work which was performed in the past. If a plaintiff is
14 able to perform previous work, that Plaintiff is deemed not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, plaintiff's residual functional capacity (RFC)
17 assessment is considered. If plaintiff cannot perform this work,
18 the fifth and final step in the process determines whether
19 plaintiff is able to perform other work in the national economy in
20 view of plaintiff's residual functional capacity, age, education
21 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir.1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir.1999). The initial burden is
27 met once plaintiff establishes that a physical or mental
28 impairment prevents the performance of previous work. *Hoffman v.*

1 *Heckler*, 785 F.3d 1423, 1425 (9th Cir.1986). The burden then
2 shifts, at step five, to the Commissioner to show that (1)
3 plaintiff can perform other substantial gainful activity and (2) a
4 "significant number of jobs exist in the national economy" which
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
6 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.1999).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
13 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir.1999). "The
14 [Commissioner's] determination that a plaintiff is not disabled
15 will be upheld if the findings of fact are supported by
16 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
17 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
18 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
19 1119 n. 10 (9th Cir.1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir.1988). Substantial evidence "means such evidence
23 as a reasonable mind might accept as adequate to support a
24 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.1965). On
28 review, the Court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir.1989)(quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir.1980)).

4 It is the role of the trier of fact, not this Court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the Court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir.1984). Nevertheless, a decision supported by substantial
10 evidence will still be set aside if the proper legal standards
11 were not applied in weighing the evidence and making the decision.
12 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
13 433 (9th Cir.1987). Thus, if there is substantial evidence to
14 support the administrative findings, or if there is conflicting
15 evidence that will support a finding of either disability or
16 nondisability, the finding of the Commissioner is conclusive.
17 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.1987).

18 ALJ'S FINDINGS

19 The ALJ found Mr. Tolliver's DIB insurance was effective
20 through December 31, 2010 (Tr. 19). At step one, he found
21 plaintiff did not work after onset at SGA levels (Tr. 17). At
22 steps two and three, the ALJ found plaintiff suffers from
23 borderline intellectual functioning (BIF), panic disorder without
24 agoraphobia, somatoform disorder, cognitive disorder, left
25 shoulder rotator cuff tear, and obesity, impairments that are
26 severe but do not meet or medically equal the severity of a Listed
27 impairment (Tr. 17-18). The ALJ found plaintiff is able to perform
28 a range of light work (Tr. 21). At step four, he found plaintiff

1 is unable to perform any past relevant work (Tr. 27). At step
2 five, relying on the Medical-Vocational Guidelines, 20 CFR Part
3 404, Subpart P, Appendix 2 (the Grids), the ALJ found plaintiff
4 can do other sedentary or light level jobs. The ALJ concluded
5 plaintiff was not disabled as defined by the Social Security Act
6 during the relevant period (Tr. 27-28).

7 **ISSUES**

8 Plaintiff alleges the ALJ erred when he weighed the medical
9 evidence and found him less than credible (ECF No. 11 at 7, 16),
10 and that new evidence incorporated by the Appeals Council supports
11 reversal (ECF No. 11 at 14-16). At the hearing, plaintiff's
12 counsel stipulated no Listing was met and this is a step five case
13 (Tr. 506).

14 Asserting the ALJ's decision is supported by substantial
15 evidence and free of legal error, the Commissioner asks the Court
16 to affirm (ECF No. 15 at 16-17).

17 **DISCUSSION**

18 **A. Weighing medical evidence**

19 In social security proceedings, the claimant must prove the
20 existence of a physical or mental impairment by providing medical
21 evidence consisting of signs, symptoms, and laboratory findings;
22 the claimant's own statement of symptoms alone will not suffice.
23 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
24 on the basis of a medically determinable impairment which can be
25 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
26 medical evidence of an underlying impairment has been shown,
27 medical findings are not required to support the alleged severity
28 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th

1 Cir.1991).

2 A treating physician's opinion is given special weight
3 because of familiarity with the claimant and the claimant's
4 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
5 1989). However, the treating physician's opinion is not
6 "necessarily conclusive as to either a physical condition or the
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
8 751 (9th Cir.1989)(citations omitted). More weight is given to a
9 treating physician than an examining physician. *Lester v. Chater*,
10 81 F.3d 821, 830 (9th Cir.1995). Correspondingly, more weight is
11 given to the opinions of treating and examining physicians than to
12 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
13 (9th Cir.2004). If the treating or examining physician's opinions
14 are not contradicted, they can be rejected only with clear and
15 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
16 ALJ may reject an opinion if he states specific, legitimate
17 reasons that are supported by substantial evidence. See *Flaten v.*
18 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
19 1995).

20 In addition to the testimony of a nonexamining medical
21 advisor, the ALJ must have other evidence to support a decision to
22 reject the opinion of a treating physician, such as laboratory
23 test results, contrary reports from examining physicians, and
24 testimony from the claimant that was inconsistent with the
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
26 751-52 (9th Cir.1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
27 Cir.1995).

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B. Credibility

To aid in weighing the conflicting medical evidence, the ALJ evaluated plaintiff's credibility and found him less than fully credible (Tr. 23-25). Credibility determinations bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir.2005).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying medical impairment, the ALJ may not discredit testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995). "General findings are insufficient: rather the ALJ must identify what testimony not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993).

Plaintiff challenges the ALJ's credibility determination. Although there is evidence of malingering, in Dr. Pollack's test results and malingering diagnosis, the ALJ's credibility assessment is nonetheless supported by clear and convincing reasons. Plaintiff failed to attend physical therapy after two

1 visits, without explanation; appeared to engage in a wide array of
2 daily activities, gave testimony inconsistent with statements to
3 providers, and the objective evidence does not support the degree
4 of limitation alleged (Tr. 23-25).

5 (1) *Failure to follow prescribed course of treatment.*

6 Plaintiff was prescribed physical therapy in 2008 but was
7 discharged on November 14, 2008. He attended two appointments and
8 then failed to return, suggesting symptoms have not been as
9 disabling as alleged (Tr. 24, 341). The ALJ notes there are no
10 significant medical records during 2007, and he cites none,
11 observing this suggests plaintiff's shoulder was not problematic
12 during that time (Tr. 24). The ALJ is correct. The court does not
13 find any 2007 medical records. Failing to follow a prescribed
14 course of treatment or obtain treatment without adequate
15 explanation can cast doubt on the sincerity of a claimant's
16 testimony. *Fair v. Bowen*, 885 F.2d 597. 603 (9th Cir.1989).

17 (2) *Daily activities.* The ALJ points out that in July 2008,
18 plaintiff went to the ER for pain after lifting a heavy cinder
19 block two days earlier (Tr. 24, 338). In October 2008, plaintiff
20 reported shoulder pain after throwing firewood the previous day
21 (Tr. 24, 358-359). Plaintiff testified he went camping for three
22 days (Tr. 502-503). The ALJ may consider a claimant's daily
23 activities when weighing credibility. *Thomas v. Barnhart*, 278 F.3d
24 947, 958-959 (9th Cir.1995).

25 (3) *Inconsistencies between statements and testimony*

26 The ALJ points out plaintiff testified he was involved in
27 physical therapy for six months and performs home exercises most
28 days, and is unable to raise his left arm above shoulder height

(Tr. 25, 491-492). The record shows that in 2008 he attended physical therapy twice (as noted above); moreover, treating and examining doctors regularly found range of motion was "full in all planes" (Tr. 25, 251, 268, 271, 296-297, 299). This is a factor properly considered when weighing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.2002 (inconsistencies in claimant's statement a proper factor when determining credibility)).

(4) *Objective evidence does not support the level of claimed limitation.*

A lack of medical evidence cannot form the sole basis for discounting pain testimony, but it is a factor the ALJ may consider when analyzing credibility. See *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.2005). As noted, the objective evidence shows treating and examining doctors have repeatedly observed plaintiff has full ROM, directly contradicting his testimony that he cannot lift his left arm above shoulder height. The lack of significant treatment records in 2007 similarly contracts the level of claimed limitation (Tr. 23-24).

The ALJ properly assessed credibility.

C. ALJ's assessment of the medical evidence

1. Physical limitations

The ALJ considered plaintiff's diminished credibility when he weighed the conflicting medical evidence.

Plaintiff argues the ALJ's finding that plaintiff is capable of a range of light work is not supported by the record (ECF No. 11 at 16-18).

An MRI of plaintiff's left shoulder on April 2, 2003 (about 3 years before onset), showed a partial thickness tear at the humeral attachment of the distal supraspinatus tendon, with no

1 full-thickness tear present. A mild infraspinatus tendinosis and
2 trace fluid in the acromioclavicular joint were thought to be
3 degenerative. He was treated conservatively (Tr. 183).

4 On May 5, 2003, plaintiff's left shoulder had full range of
5 motion. The exam was felt to be equivocal. Treating doctor Larry
6 Lamb, M.D., notes plaintiff did not appear to be in much
7 discomfort. On May 5 and May 13, 2003, Dr. Lamb continued to feel
8 surgery was not appropriate. He recommended an independent medical
9 examination (IME). On June 4, 2003, plaintiff was released for
10 light duty work. On June 25, 2003, an orthopedist, Michael
11 Barnard, M.D., performed the IME. At that time plaintiff was not
12 enrolled in physical therapy, had last seen Dr. Lamb about a month
13 earlier, and no further treatment had been recommended. Plaintiff
14 complained his shoulder was sore, and the tips of his fingers and
15 thumb tingle sporadically. He was not taking any medication (Tr.
16 183-85). Dr. Barnard found it notable that plaintiff got on the
17 examining table and took off his "T-shirt overhead with both upper
18 extremities, demonstrating no evidence of any problem." He was not
19 performing at-home physical therapy exercises. Plaintiff appeared
20 significantly deconditioned (Tr. 185-186). Testing revealed no
21 positive impingement signs. Dr. Barnard diagnosed a partial tear,
22 resolving, and opined the injury is "quite mild." He agreed
23 surgery was unnecessary, strongly recommended a vigorous home
24 exercise program, and opined no further treatment or testing was
25 warranted. He opined lifting should be limited to 25-35 pounds
26 until the partial tear healed completely (Tr. 187-189, 196).

27 In March 2006, treating surgeon Patrick Lynch, M.D.,
28 performed a diagnostic procedure which he explained was also

1 potentially therapeutic. His post-operative diagnosis was left
2 shoulder recalcitrant subacromial bursitis with rotator cuff
3 tendinitis, small tearing of anterosuperior glenoid labrum (Tr.
4 209).

5 Dr. Lynch notes in August 2006 (about 5 months after onset
6 and surgery) plaintiff "thinks things are going well in terms of
7 regular activities." Plaintiff and Dr. Lynch both agreed he was
8 capable of lifting 30 pounds repetitively (Tr. 262).

9 The treating surgeon's opinion supports the ALJ's assessed
10 RFC. Plaintiff's own opinion of his lifting ability also supports
11 the assessed RFC for a range of light work.

12 Another IME was performed in November 2006. No ratable
13 impairment was found (Tr. 246, 251).

14 The undersigned finds that the ALJ properly analyzed the
15 record and determined that plaintiff could perform light exertion
16 work with certain nonexertional restrictions (simple, routine
17 tasks and instructions, minimal change, infrequently perform more
18 complex tasks, and have superficial public contact). While
19 plaintiff argues that the ALJ erred by failing to assess greater
20 limitations, the record does not support a more restrictive
21 physical RFC determination.

22 *2. Psychological limitations*

23 The ALJ again considered plaintiff's diminished credibility
24 when he weighed the conflicting evidence of psychological
25 limitation.

26 On May 27, 2008, Kristin Sims, MA, with the approval of W.
27 Scott Mabee, Ph.D., examined plaintiff. No medical records were
28 provided for Dr. Mabee's review. Plaintiff said anxiety,

1 depression, and back and shoulder pain prevent him from working.
2 He has taken hydrocodone for two years for pain. His doctor told
3 him not to lift more than 20 pounds due to the shoulder injury [as
4 discussed above, this is incorrect]. In the past plaintiff took
5 medication for depression and anxiety but stopped when he felt he
6 no longer needed it. Currently he has anxiety attacks two to three
7 times a week, unrelated to any particular trigger. MMPI-2 results
8 were of questionable validity. Dr. Mabee assessed panic disorder
9 without agoraphobia, borderline intellectual functioning (BIF),
10 and a current GAF of 50 indicating serious symptoms or impairment.
11 Dr. Mabee opined plaintiff should be able to follow simple verbal
12 and written instructions but is likely to have difficulty with
13 focus, sustaining concentration, and memory. Pace is likely to be
14 below average due to impaired cognitive functioning (Tr. 330-334).

15 On January 6 and 12, 2010, Dennis Pollack, Ph.D., examined
16 plaintiff. He reviewed medical records and Dr. Mabee's report.
17 Pollack states plaintiff's thinking was sometimes illogical and
18 tangential; there was some indication of hallucinations and
19 delusions, and "some unusual anxiety-related symptoms" were
20 reported. His primary complaint was pain in his left shoulder,
21 upper back pain due to a herniated disc, low back pain, right hip
22 pain, and left carpal tunnel release in 2007. He exercises three
23 times a week as prescribed by his doctor and can walk 500 feet
24 before he needs to rest. Plaintiff washes dishes, makes beds,
25 sweeps, washes clothes, camps, and fishes. He suffers from panic
26 attacks. MMPI-2 results show a markedly elevated F-scale; other
27 tests show malingering. Dr. Pollack diagnosed major depressive
28 disorder, moderate and chronic; pain disorder associated with both

1 psychological factors and general medical condition; cognitive
2 disorder; alcohol abuse in remission; and malingering. He assessed
3 a GAF of 50 (Tr. 421-431). Dr. Pollack found plaintiff markedly
4 limited in both the ability to (1) sustain an ordinary routine
5 without special supervision, and to (2) complete a normal workday
6 and workweek without interruptions from psychological symptoms and
7 to perform at a consistent pace. He found no limitation in the
8 ability to understand, remember and carry out very short and
9 simple instructions (428-429). Dr. Pollack observes plaintiff has
10 not undergone any type of treatment for his anxiety/panic attacks
11 (Tr. 426).

12 The mental limitations assessed by the ALJ in this case are
13 partially in accord with those assessed by Drs. Mabee and Pollack.
14 While plaintiff argues that the ALJ erred by failing to assess
15 greater limitations, the ALJ properly analyzed the record and
16 determined that plaintiff had some mild symptoms but was generally
17 functioning pretty well. The fact that he held a job for 8 years
18 strongly indicated he is not as severely limited as either
19 psychologist opined. Nor has plaintiff undergone any type of
20 mental health treatment during the relevant period. The record
21 does not support a more restrictive mental RFC finding. Even if
22 the ALJ improperly rejected Dr. Pollack's opinion because it was
23 at the behest of plaintiff's attorney (as plaintiff suggests), the
24 ALJ's other reasons are specific, legitimate and supported by
25 substantial evidence, making any error in this regard clearly
26 harmless. The Commissioner did not err.

27 The ALJ is responsible for reviewing the evidence and
28 resolving conflicts or ambiguities in testimony. *Magallanes v.*

1 *Bowen*, 881 F.2d 747, 751 (9th Cir.1989). It is the role of the
2 trier of fact, not this court, to resolve conflicts in evidence.
3 *Richardson*, 402 U.S. at 400. The court has a limited role in
4 determining whether the ALJ's decision is supported by substantial
5 evidence and may not substitute its own judgment for that of the
6 ALJ, even if it might justifiably have reached a different result
7 upon de novo review. 42 U.S.C. § 405(g). The ALJ did not err when
8 he weighed the medical evidence.

9 **D. New evidence incorporated by the Appeals Council**

10 Last, plaintiff alleges the court should reverse the ALJ's
11 decision based on new evidence admitted by the Appeals Council
12 (ECF No. 11 at 11, 14-16). The new evidence is a letter from
13 treating doctor Angelika Kraus, M.D., dated April 16, 2010 (Tr.
14 467). The Appeals Council considered this evidence and determined
15 that it did not provide a basis for changing the ALJ's decision
16 (Tr. 7-10, 467).

17 This court has jurisdiction to remand matters on appeal for
18 consideration of newly discovered evidence. *Goerg v. Schweiker*,
19 632 F.2d 582, 584 (9th Cir.1981); 42 U.S.C. § 405(g). Section
20 405(g) expressly provides for remand where new evidence is
21 "material" and there is "good cause" for the failure to
22 incorporate the evidence in a prior proceeding. *Burton v. Heckler*,
23 724 F.2d 1415, 1417 (9th Cir.1984). To be material, the new
24 evidence must bear directly and substantially on the matter in
25 issue. *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir.1985). Also,
26 there must be a reasonable possibility that the new evidence would
27 have changed the outcome if it had been before the Secretary. *Booz*
28 *v. Secretary of Health and Human Services*, 734 F.2d 1378, 1380-81

1 (9th Cir.1984).

2 First, the new evidence is arguably not material. Dr. Kraus's
3 letter simply indicates she "agrees" with the evaluations by Drs.
4 Pollack and Mabee (Tr. 467). As the Commissioner observes,
5 explicitly "approving" evidence in the record is cumulative rather
6 than new. More importantly, plaintiff has not shown a reasonable
7 probability of changing the outcome of the ALJ's determination
8 with the new evidence. As discussed above, the ALJ's reasons for
9 rejecting some of the most extreme limitations assessed by Pollack
10 and Mabee are specific, legitimate, and supported by substantial
11 evidence. To the extent Dr. Kraus "agrees" with Dr. Pollack, he
12 diagnosed malingerer. Dr. Kraus provides no basis for her
13 opinion, and it is inconsistent with her prior treatment notes and
14 opinions, as the Commissioner correctly points out (ECF No. 15 at
15 14-15). It is difficult to see how this would have changed the
16 outcome. Furthermore, plaintiff has not show good cause for the
17 failure to incorporate this opinion prior to the ALJ's decision.
18 Plaintiff offers no reasons why this information was not solicited
19 earlier. *See e.g., Allen v. Secretary of Health and Human*
20 *Services*, 726 F.2d 1470, 1473 (9th Cir.1984)(seeking out a new
21 success with the agency does not establish "good cause"). Since
22 plaintiff fails to meet the materiality and good cause
23 requirements, the Court is not able to consider the newly
24 submitted evidence.

25 CONCLUSION

26 Having reviewed the record and the ALJ's conclusions, this
27 court finds that the ALJ's decision is free of legal error and
28 supported by substantial evidence.

1 **IT IS ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment (**ECF No. 10**) is
3 **denied.**

4 2. Defendant's Motion for Summary Judgment (**ECF No. 14**) is
5 **granted.**

6 The District Court Executive is directed to enter judgment in
7 favor of Defendant, file this Order, provide copies to counsel,
8 and **CLOSE** this file.

9 DATED this 3rd day of May, 2012.

10
11 s/ James P. Hutton
12 JAMES P. HUTTON
 UNITED STATES MAGISTRATE JUDGE